Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of SBC Communications, Inc.	)	
For Forbearance from Regulation as a	)	CC Docket No. 98-227
Dominant Carrier for High Capacity	)	
Dedicated Transport Services in	)	
Fourteen Metropolitan Service Areas	)	
	)	

REPLY COMMENTS
OF THE
AD HOC TELECOMMUNICATIONS
USERS COMMITTEE

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The Ad Hoc Telecommunications Users Committee (the "Ad Hoc Committee" or the "Committee") submits these Reply Comments in response to the comments and oppositions filed with respect to the above-referenced Petition of SBC Communications ("Petition").[1] For the reasons set forth below, the Committee urges the Commission to deny the Petition.

The Committee's members, all major buyers of telecommunications services, would be among the first to benefit from competitive pricing in the local exchange and access service markets. Therefore, the Committee's recommendation that the Commission deny SBC's Petition would seem to be counter to its members' short-term interest in lower rates. The Ad Hoc Committee has concluded, however, that its long-

[1] Petition of SBC Companies for Forbearance, in CC Docket No. 98-227, (filed Dec. 7, 1998). ("SBC Petition" or "Petition").

term interest in sustainable, effectively competitive local exchange and access service markets is best served by denial of the Petition.

SUMMARY

SBC has asked the Commission to declare it non-dominant in the provision of high-capacity dedicated transport services[2] in 14 MSAs.[3] Alleging that substantial competition exists in the provision of high-capacity dedicated transport services in these 14 MSAs, SBC has asked the Commission to forbear from applying dominant carrier regulation to its provision of such services in that market under Section 10 of the Communications Act of 1934, as amended (the "Act").[4] Specifically, SBC has requested the Commission to declare that SBC high capacity dedicated transport services in the 14 MSAs are:[5]

- subject to permissive detariffing, *i.e.*, permitted but not mandatory tariffing on one days' notice, with a presumption of lawfulness and without cost support;

- not subject to Section 69.3(e)(7) of the Commission's Rules,[6] which requires dominant carriers to charge averaged rates throughout their study areas (i.e., be allowed to offer volume and term discounts); and

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[2] Petition at 1. As used herein and in the Petition, "high-capacity dedicated transport services" are "those special access services, which access entrance facilities, and switched access direct trunked transport services that operate at DS1 and higher transmission speeds (e.g., DS1, DS3, OCN)."

[3] Petition at 2. The 14 MSAs are: Little Rock, AR; Los Angeles, CA (including Orange County and Riverside); Sacramento, CA; San Diego, CA; San Francisco, CA; San Jose, CA; St. Louis, MO; Reno, NV; Oklahoma City, OK; Austin, TX; Dallas/Ft. Worth, TX; El Paso, TX; Houston, TX; and San Antonio, TX. SBC notes that although a single petition requests forbearance for all 14 MSAs, forbearance for *each* MSA should be considered separately by the Commission.

[4] 47 U.S.C. § 160.

[5] Petition at 22-23.

[6] 47 C.F.R. § 69.3(e)(7).

- free from price cap and rate-of-return regulation.

Because each of SBC's requests is predicated upon its assertion that substantial competition exists in the 14 MSAs for high-capacity dedicated transport services, if such competition does not in fact exist – and it does not – SBC's requests must be denied.

This is not to say, however, that a dominant ILEC should never be granted some degree of pricing flexibility. As explained more fully below, the Commission has already recognized that, under the appropriate circumstances, the "competitive necessity doctrine" can justify volume discounts for generally available interstate special access services offered by dominant ILECs offerings that are priced to respond to competition for such services.[7] The Commission's prior rejections of dominant ILECs' single-customer competitive response offerings have turned largely on the findings that those offerings were not generally available to similarly situated customers and therefore were unreasonably discriminatory under Section 202(a) of the Act.[8] But the potential for unreasonable discrimination might be diminished, while still allowing dominant ILECs to compete for contested customers, if the Commission requires those ILECs to justify their single-customer competitive response offerings using the competitive necessity doctrine and, in addition, requires the ILECs to tariff approved offerings as contract tariffs and make them generally available to any customer willing to agree to the volume and term requirements of the tariffed offerings.

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[7] *SBC, supra,* note 4**, 12 FCC Rcd at 19315 & n. 11 (citing *Private Line Rate Structure and Volume Discount Practices Guidelines,* CC Dkt. No. 79-246, Report and Order, 97 F.C.C. 2d 923, 948 (1984) ("*Private Line Guidelines Order*").

[8] 47 U.S.C. § 202(a); *see supra,* note **4.

Such an approach would be consistent with the Commission's reasoning when it concluded that AT&T could lawfully make individualized contract-based offerings to business customers, as long as AT&T tariffed those offerings and made them generally available to other similarly situated customers willing and able to meet the contract tariffs' terms.[9] The Commission explained that competition in the business interexchange services market was sufficient to limit AT&T's ability to use such individually negotiated offerings to unreasonably discriminate, even though AT&T was still classified as a dominant carrier in that market.[10]

Although the Commission has not yet found a dominant ILEC's single-customer offering to be lawful under the competitive necessity doctrine,[11] emerging competition in certain ILEC product and geographic markets warrants Commission exploration of how best to balance the public benefits that would come from allowing ILECs to compete fairly for business with the public's interest in ensuring that such ILEC competition does not produce unreasonable discrimination nor retard the development of effectively competitive local exchange and access service markets. An industry-wide approach to this issue, such as the Commission's *Access Reform* rulemaking, CC Docket No. 96-262, rather than a piecemeal consideration of numerous petitions for waiver or forbearance,[12] is the appropriate avenue for addressing this difficult balancing problem.

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[9] *Competition in the Interstate Interexchange Marketplace,* CC Dkt. No. 90-132, Report and Order, 6 FCC Rcd 5880, 5902-03 (1991) ("*Interexchange Competition Order*").

[10] *Id.* at 5903.

[11] *SBC, supra,* note **4, 12 FCC Rcd at 19315; *SBC Reconsideration Order, supra,* note 3, 13 FCC Rcd at 6966 & n. 13.

[12] See, e.g., Petitions of US West, CC Dkt. No. 99-1, and Bell Atlantic, CC Dkt. No. 99-24.

DISCUSSION

I. The Commission Should Deny SBC's Petition For Forbearance.

As SBC has explained,[13] under Section 10 of the Act,[14] the Commission must forbear from enforcing any regulation or provision of the Act only if:

- enforcement is not necessary to ensure that a carrier's rates or practices are just and reasonable and not unjustly and unreasonably discriminatory;
- enforcement is not necessary to protect consumers; *and*
- forbearance is consistent with the public interest.

SBC has argued that competition in the relevant product and geographic markets already is sufficient to ensure that its rates and practices will be just and reasonable and not unjustly and unreasonably discriminatory; therefore, it claims that it has satisfied the first requirement for forbearance.[15] Moreover, SBC has asserted that the level of competition makes dominant carrier regulation of SBC's high-capacity dedicated transport services unnecessary to protect consumers, thus satisfying the second requirement for forbearance.[16] Finally SBC alleges that the forbearance it has

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[13] Petition at 4.

[14] 47 U.S.C. § 160(a).

[15] Petition at 25.

[16] *Id.* at 26.

requested would increase competition in the relevant product and geographic markets, and hence be consistent with the public interest.[17]

Substantively, SBC's Petition must succeed or fail based upon the level of competition that actually exists in the relevant product and geographic markets. Because the weight of evidence in the record refutes SBC's claims regarding the level of such competition, SBC has failed to meet the three-part test for forbearance under Section 10 and its Petition should be denied.

A. The Quality Strategies Study does not support a finding that high-capacity services in the 14 MSAs is competitive.

SBC employs the Quality Strategies Study (the Study) to support its claims regarding its market power – or claimed lack thereof – in the 14 MSAs. For example, SBC uses the study to claim that it has lost 38.2% of the high-capacity market in Little Rock, Arkansas, and should therefore be declared non-dominant.[18] While SBC may have indeed lost some of the high capacity market, flaws in the Study methodology result in overstatement of SBC's market share losses. Ad Hoc concurs with the position taken by several parties, as discussed in more detail below, that the Study is both flawed and insufficient to support a finding that the markets for high-capacity services in the 14 MSAs are competitive.

1. The Quality Strategies Study is methodologically flawed.

As a threshold matter, the Study suffers from extreme methodological flaws. The

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[17] *Id.* at 28.

[18] Attachment A to SBC Petition at 5.

most egregious of the methodological flaws in the Study is that it is non-reproducible and thus non-verifiable. Another obvious methodological flaw in the Study is the basic metric of comparison – "equivalent circuits" – employed by Quality Strategies. Ad Hoc agrees with commenting parties who note that the use of equivalent circuits, rather than revenues, as the measure of market share overstates the any market share loss.[19] By using this measure "the loss of a single DS3 is viewed as the same as the loss of 28 DS1s, while the price of a single DS3 may be only two to three times the prices of a DS1, so the revenue loss of a DS3 is vastly overestimated by the use of the equivalent DS1 measurement."[20] Logix argues, and Ad Hoc concurs, that using DS1 equivalents "is a grossly inadequate basis for estimating market share."[21]

Ad Hoc agrees with AT& that many important facts about the study's methodology are unknown."[22] AT&T states that its analysis of the Study raised the following questions:

- What time period was used to develop the trend analysis, and is it reflective of the current CLEC marketplace?

- What role did such market aspects as product life cycle state, product price history or market penetration of cross elastic services play in the setting of market trends for high capacity services?

- How were outside influences like regional economic strength, number

[19] See, e.g., Logix at 5, MCI at 14.

[20] AT&T Opposition at 5.

[21] Logix Opposition at 4.

[22] AT&T at 2.

of buildings available, or occupancy rates measured?[23]

A study designed to establish the competitive nature of any service, including high capacity services, in support of forbearance request should answer these questions, not raise them.[24]

2. SBC's market power analysis suffers from other significant deficiencies.

An analysis of the competitiveness of markets must, at the very least, define the relevant geographic and product markets and provide both supply and demand elasticity analysis.[25]

Ad Hoc concurs with the parties that identify the problems with SBC's lack of clarity regarding its formulation of the relevant product market.[26] For example, the Study defines the relevant product market as "the universe of DS-1 and above circuits used either for end user customer's traffic (Provider) or for carrier transport (Transport)."[27] The Provider market, however, appears to be a different market than the Transport market, but these two markets are lumped together for purposes of the Study. SBC does not seem to have considered this fact. In its opposition, GST notes that "SBC and its consultants never actually define the services that are being studied

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[23] *Id.*, at 6.

[24] SBC's *ex parte* communication, presented to the FCC on December 18, 1998, provides no additional probative information about the study and does not clarify any of the methodological flaws identified herein or by commenting parties in this proceeding.

[25] Second Report and Order in CC Dkt. No. 96-149 and Third Report and Order in CC Dkt. No. 96-61 at ¶¶ 16, 25-31, 40-44.

[26] E.g., GST Opposition at 8 "[SBC] never does define the product market."

[27] Quality Strategies Study at 2.

for determinations of market dominance."[28]

GST explains that when the FCC determined that AT&T was no longer a dominant interexchange carrier it examined particular services, not facility types. Similarly, as noted by GST, in its consideration to forbear from regulating Comsat, the FCC examined competition in the following submarkets of international satellite telephony service: switched voice, private line, full-time and occasional video, Intelsat earth station service, thin routes and occasional-use single carriers.[29]

Similarly, SBC provides almost no information regarding the specific geographic information pertinent to its Petition. CompTel concludes that "SBC's market study provides no insight as to whether SBC's decline in market power is limited to specific geographic areas within the MSA or throughout the entire MSA,"[30] an issue of extreme importance to large users if forbearance is permitted. If the alleged "competition" exists only in isolated areas within a given MSA, then SBC could price-discriminate as between areas in which competing services are present and those in which it retains unchallenged monopoly control with no protection for customers in the non-competitive areas.

SBC's presentation of supply and demand elasticity is similarly insufficient. Ad Hoc agrees with the characterization that "SBC has provided no more than generalized allegations of demand and supply elasticities,"[31] and what little supply and demand

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[28] GST at 9.

[29] GST at 10.

[30] Comptel at 6.

[31] Logix at 5.

elasticity information is provided by SBC is not supported by the facts.[32]

MCI provides a compelling analysis of both supply and demand elasticity. Regarding supply elasticity, for example, MCI identifies how "SBC's focus on 'unused network capacity' is misleading" in that the number of buildings served by CAPs is far less than the number of buildings served in these MSAs by SBC.[33] Other parties convincingly dismiss SBC's claims that competiting suppliers can quickly respond to demand increases,[34] citing specifically to the difficulty of collocating within SBC's territory.[35]

MCI cites both the willingness and the ability of customers to switch suppliers as an important criterion for establishing demand elasticity.[36] Even if alternative sources of supply were available, MCI and other parties explain that the termination liability provisions of SBC's tariffs[37] prevent customers from switching suppliers. Thus, the real demand for these services is far less elastic than asserted by SBC.[38] A second barrier cited by MCI is the significant non-recurring cost (NRC) that SBC assesses on customers switching to a competitive supplier. MCI claims that a customer shifting 28

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[32] Hyperion at 4-5.

[33] MCI at 7.

[34] Petition at 19 and 27.

[35] See, e.g., AT&T at 12.

[36] MCI at 10.

[37] See SWBT Tariff FCC No. 73, Section 7.2.20(D)(3).

[38] MCI at 11.

DS1s from Pacific Bell to a competitor would incur an NRC of over $12,500.[39] MCI explains that, "Such nonrecurring charges lengthen the "payback period" so significantly that switching to CAP transport is often not a viable alternative even when competitors' facilities are in place."[40]

Based upon these comments and the experience of Ad Hoc members, SBC's competitors do not have the ability to "quickly acquire" capacity (i.e., supply is relatively *inelastic*) on routes currently dominated by SBC in the 14 MSAs. Moreover, customers cannot easily switch suppliers (i.e., demand is relatively *inelastic*). For competition to exist, and thus for the Commission to forbear from regulation of these services, supply and demand must be shown to be highly elastic. While this game of "he said, she said" basically comes down to which party the Commission is to believe, it should be incumbent upon SBC to prove that elasticity of demand and supply exists in these markets, a showing they have been unable to provide.

3. Parties Dispute SBC's Claims of Competition.

Although the Ad Hoc Committee does not have first-hand access to raw data regarding the level of actual competition in the provision of high-capacity services in the 14 MSAs, other parties with the most direct knowledge of the level of competition in these markets – IXCs and CAPs – present evidence that SBC does not face effective competition in the provision of such services in the 14 MSAs. The experience of members of the Ad Hoc Committee is consistent with this conclusion.

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[39] *Id.*

[40] *Id.*

The Oppositions of AT&T, MCI, Sprint, Logix, CompTel, and GST Telecom[41] present data and arguments that refute SBC's claim that it lacks power in the provision of high-capacity services in the 14 MSAs. For example, SBC's petition is in no small part based upon its claim that AT&T no longer relies substantially upon its high capacity services in the specified MSAs. AT&T states, however, that, in fact, it "still purchases the lion's share of its high capacity services in these areas from SBC."[42] Similarly, MCI states that it "has found that competitive alternatives to SBC are available on only a very limited number of routes" and that "SBC still provides, in the aggregate, over 90 percent of MCI Worldcom's DS1 interoffice and channel termination circuits in the 14 MSAs ... and 100 percent of the multiplexing purchased by MCI Worldcom in the 14 MSAs."[43]

Given this record, the Commission cannot find that the 14 MSA's are effectively competitive even for the so-called high capacity services. Competition has not reached a level that would make dominant carrier regulation unnecessary to ensure the justness and reasonableness of SBC's rates and practices with respect to high-capacity services. Nor would current market conditions be adequate to protect consumers in the absence of dominant carrier regulation of such services. And because competition is presently insufficient to constrain anti-competitive conduct by SBC, forbearance may

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[41] AT&T Opposition in CC Dkt. No. 98-227 (filed Jan. 21, 1999) at 1; MCI Worldcom Opposition in CC Dkt. No. 98-227 (filed Jan. 21, 1999) ("MCI Opposition") at 1; Opposition of Sprint Corporation in CC Dkt. No. 98-227 (filed Jan. 21, 1999) ("Sprint Opposition") at 1; Opposition of the Competitive Telecommunications Association in CC Dkt. No. 98-227 (filed Jan. 21, 1999) ("CompTel Opposition") at 1; Comments of GST Telecom Inc. in Opposition to Petition for Forbearance in CC Dkt. No. 98-227 (filed Jan. 21, 1999) ("GST Telecom Opposition") at 1.

[42] AT&T Opposition at 3.

[43] MCI at 8.

impair, rather than promote, competition, and ultimately disserve the public interest. For these reasons, SBC's Petition should be denied.

B. The Commission should take a comprehensive, rather than piecemeal, approach to pricing flexibility for dominant ILECs.

Grant of SBC's Petition would not only be wrong as a substantive matter, it would be a procedural mistake as well. Already this petition, and U S West's before it,[44] have invited "me too" petitions from other ILECs.[45] Proceeding on the basis of individual petitions would also waste Commission resources and could result in inconsistent rulings.[46]

The issues raised by SBC's Petition are, however, extremely important and should be addressed on an industry-wide scale, a position that is supported by many of the commenting parties.[47] To the extent that consideration of such issues might result in generally applicable changes in the Commission's policies regarding ILEC pricing flexibility, consideration of these should occur in the *Access Reform* rulemaking, CC Docket No. 96-262.[48] In short, apart from whatever substantive merit the Commission may find in SBC's Petition, as a procedural matter, the Commission should deny the Petition and address the issues it raises in a rulemaking proceeding.

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[44] Petition of U S WEST Communications Inc., for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA in CC Docket No. 98-157 (filed Aug. 24, 1998).

[45] See e.g., Petition of U S West (CC Dkt. No. 99-1) and Petition of Bell Atlantic (CC Dkt. No. 99-24) which both request forbearance for high capacity services.

[46] Logix Opposition at 2.

[47] See, e.g., AT&T at 2, Logix at 1-2, Hyperion at 1, and MCI at 4-5.

[48] The Commission is considering in CC Docket No. 96-262 the degree of pricing flexibility that it should grant local exchange carriers subject to the price caps rules. The Committee's comments on U S West's Petition are relevant to issues raised in CC Docket No. 96-262.

II. The Commission Should Consider In A Rulemaking The Competitive Necessity Doctrine And A Contract Tariff Approach As The Means For Granting Dominant ILEC Requests For Pricing Flexibility At Present.

Petitions, such as SBC's, for regulatory forbearance under Section 10 of the Act are not the only method by which dominant ILECs may seek pricing flexibility for their services.[49] The Commission has already recognized that the competitive necessity doctrine can justify volume discounts for certain ILEC services which might otherwise be found unreasonably discriminatory under Section 202(a) of the Act.[50] In the *SBC Reconsideration Order,*[51] however, the Commission stated that,

> at least until [it] revisit[s] these issues in the broader context of [a] rulemaking proceeding, [it] would not apply the competitive necessity doctrine to dominant local exchange carriers who are proposing customer-specific tariffs because such an application would thwart the public interest of promoting competition in the local exchange and exchange access markets.

Although SBC has failed to demonstrate a sufficient level of competition to justify the forbearance it has requested, the evidence it has presented at least indicates that conditions are becoming more competitive in discrete, niche markets. Thus, it now may be appropriate for the Commission to revisit the possibility of allowing dominant ILECs to make single-customer offerings in response to competition under the competitive necessity doctrine, if such offerings are tariffed as contract tariffs and are generally available to similarly situated customers.

A. The Competitive Necessity Doctrine Provides One Mechanism For

[49] Several parties contend that, irrespective of whether forbearance is warranted, SBC is not fully using already existing pricing flexibility mechanisms for high capacity services. See, e.g., AT&T at 3.

[50] 47 U.S.C. § 202(a); *see Private Line Guidelines Order, supra,* note **10, 97 F.C.C. 2d 923, 948.

[51] *Supra,* note **4, 13 FCC Rcd at 6966.

Determining Whether Competitive Conditions Justify Pricing Flexibility

In the *Private Line Guidelines Order*,[52] the Commission established a three-part test for determining whether the competitive necessity doctrine could justify volume discounts on generally available interstate special access services. Under that test, which has recently been reaffirmed in the *SBC* and *SBC Reconsideration Orders*,[53] a dominant ILEC's generally available discounted competitive response offering will be lawful only if:

- equally or lower priced competitive alternatives are generally available to customers of the discounted offering;
- the discounted offering responds to competition without undue discrimination; and
- the discount contributes to reasonable rates and efficient services for all users.

The competitive necessity test articulated in the *Private Line Guidelines Order* first requires evidence of substitutes for the relevant ILEC service, priced at truly competitive levels. Second, it requires the proposed ILEC offering to be in response to competition and not to be unduly discriminatory. The latter requirement, and the requirement that the ILEC's competitive offering "contribute to reasonable rates and efficient services for all users" diminish the dominant ILECs' ability to misuse the

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[52] Supra, note **10, 97 F.C.C. 2d 923, 948.

[53] *Supra,* note **4, 12 FCC Rcd 19315 & n. 11; 13 FCC Rcd at 6966.

competitive necessity doctrine to disguise predatory pricing or unlawful cross-subsidization of competitive services.

The Commission should consider whether current or anticipated competitive conditions could warrant justification of generally available single-customer competitive response offerings by dominant ILECs under a competitive necessity-based theory.

B. Adoption Of A Contract Tariff Process For Single-Customer Competitive Response Offerings Could Address The Commission's Historical Concerns About Unreasonable Discrimination, And Emerging Competition In Some ILEC Markets May Diminish The Risk Of Anti-competitive ILEC Conduct.

In the *SBC Reconsideration Order,* the Commission explained that its cases analyzing the competitive necessity doctrine did not bar application of the doctrine to the customer-specific offering SBC had proposed, but that it had refused to apply the doctrine to SBC's tariff because "the tariff potentially enabled [SBC] to prevent competitive entry."[54] Moreover, the Commission held that its precedent did not require it to apply the competitive necessity doctrine to tariffs, such as SBC's, that were not generally available to similarly situated customers.[55] Because it found that the rates in SBC's proposed competitive-response tariff were available only to "subsequent customer[s] [having] a network configuration nearly identical to that of the original customer" – an unlikely scenario – the Commission concluded that the tariff was effectively limited to the original customer and thus was unreasonably discriminatory

[54] *Supra,* note **4, 13 FCC Rcd at 6967.

[55] *Id.* at 6966.

under Section 202(a) of the Act.[56]

In reaching its first conclusion regarding the risk of anti-competitive conduct, the Commission considered substantial record evidence concerning the level of competition SBC faced in the relevant product and geographic markets. That evidence was insufficient to assuage the Commission's concerns regarding the potential for anti-competitive conduct by SBC. But as the Commission itself has recognized in the *Access Charge Reform* Order,[57] competition is increasing in certain ILEC markets, and regulation of ILECs' interstate access services should become streamlined in response to such competition.

The Commission's second principal concern regarding the lawfulness of single-customer offerings by dominant carriers – namely, that they would be unreasonably discriminatory if not made generally available to similarly situated customers[58] – is readily addressed. The Commission need only look to the *Interexchange Competition Order*[59] for precedent and guidance regarding the accommodation of Section 202(a)'s prohibition on unreasonable discrimination with single-customer, competitive response offerings by dominant carriers. In that Order, the Commission concluded that individualized offerings to customers in competitive markets were not *per se* unlawful under Section 202(a) as long as the terms of such offerings were both (1) made generally available to all other similarly situated customers willing and able to meet

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[56] *Id.* at 6965-66.

[57] *Access Charge Reform Order* at ¶¶ 260 - 274.

[58] *SBC, supra,* note **4, 12 FCC Rcd at 19314-16; *AT&T Communications – Tariff F.C.C. No. 15, Competitive Pricing Plan 22, Transmittal No. 3921,* 7 FCC Rcd 4636 (Com. Car. Bur. 1992).

[59] Supra, note **12, 6 FCC Rcd at 5902-03.

those terms; and (2) memorialized in contract-based tariffs filed with the Commission prior to their effective date.[60] The Commission's reasoning in reaching that conclusion is firmly supported by judicial precedent.[61]

The second prong of the competitive necessity test requires that a competitive response offering not be unduly discriminatory. If a dominant ILEC's single-customer offering meets both requirements for AT&T contract-based tariffs established in the *Interexchange Competition Order,* then the offering should be deemed to satisfy the competitive necessity test's prohibition on undue discrimination. Moreover, if an offering is tariffed and made generally available to similarly situated customers, the Commission's historical concerns about unreasonable discrimination should be answered.

C. The Commission Should Consider The Issues Raised By SBC's Petition In The *Access Charge Reform* Proceeding.

In the *Access Charge Reform* Order,[62] the Commission endorsed the use of a market-based approach to access reform, in which the Commission would "retain the protection afforded by price cap regulation, while relaxing particular restrictions on incumbent ILEC pricing as competition emerges..." The Commission acknowledged, however, that "[d]eregulation before competition has established itself ... can expose consumers to the unfettered exercise of monopoly power and, in some cases, even stifle the development of competition, leaving a monopolistic environment that

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[60] *Id.* at 5903.

[61] *MCI Telecommunications Corp. v. FCC,* 917 F.2d 30, 38 (D.C. Cir. 1990); *see Sea-Land Service, Inc. v. ICC,* 738 F.2d 1311, 1316-19 (D.C. Cir. 1984).

adversely affects the interests of consumers."[63] It therefore announced that it would continue to rely upon current mechanisms to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory.[64] The Commission indicated that it would consider the details of its market-based approach, in particular, the "specific competitive triggers and corresponding flexibility," in a later report and order.[65]

The Commission should use its recent reopening of the record in the *Access Charge Reform* proceeding to consider the circumstances in which the competitive necessity doctrine and use of contract-based tariffs might justify competitively priced, de-averaged service offerings by dominant ILECs.[66]

III. Price Caps Treatment of Single-Customer Competitive Response Offerings.

In the event the Commission chooses to implement a solution that involves allowing SBC and/or other ILECs to file single-customer, competitive response tariffs, it must take care to ensure that these pricing plans do not adversely impact the prices made available to the vast majority of other ILEC high-capacity customers – those without competitive alternatives. It is therefore imperative that the high-capacity services priced on a competitive response basis be removed from the existing price

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[62] *Access Charge Reform Order, supra,* note 2, at ¶ 260.

[63] *Id.* at ¶ 270.

[64] *Id.* at ¶ 264.

[65] *Id.* at ¶ 270.

[66] Several parties have suggested that the Commission consider the issue of pricing flexibility for dominant ILECs in the *Access Charge Reform* proceeding. AT&T at 2, Logix at 2, Hyperion at 4, MCI at 1-2.

caps baskets. The Commission should use Section 61.42(f) of its Rules to remove single-customer, competitive response tariffs from existing price caps baskets.[67] Once removed from the existing transport basket (and DS1 and/or DS3 sub-categories), two possible treatments exist.

These services could be excluded from price caps altogether. Consistent with the requirement that services be offered on a nondiscriminatory basis, however, a tariffing requirement should remain in place for the competitive response offerings despite their removal from the price caps plan.[68]

An alternative, and perhaps more appropriate, solution would be to create an additional "competitive response basket" into which services in this category could be moved – a basket similar in many respects to the "interexchange services" basket that exists today.

This second approach seems more appropriate because it offers a modicum of protection in the event that the experiment in competition goes awry. Service offerings that are competitive at the time of tariffing may not remain so. While creation of a separate basket would not by itself offer an ILEC's competitors protection, it would offer some protection to its customers. Moving such services into a newly created basket would ensure that they remain within the Commission's control until such time as

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[67] Section 61.42(f) of the Commission's Rules states; "Each local exchange carrier subject to price cap regulation shall exclude from its price cap baskets such services or portions of such services as the Commission has designated or may hereafter designate by order."

[68] In the event such services are removed from price caps altogether and treated as "non-regulated," the Commission should establish a methodology for ensuring that the investment associated with the newly classified "non-regulated" services is properly identified, and such reclassification should be properly accounted for as an exogenous cost reduction pursuant to 47 C.F.R. § 61.45(d)(1)(v). Such exogenous adjustment should be identified as being directly attributable to the basket or sub-basket from which the service was removed.

competition is more widespread and can be judged sustainable over the long haul. If such competition does not develop or existing competition withers, customers of ILEC contract tariff offerings should be protected against unreasonable rates, particularly rate increases imposed by the ILECs through their tariffs. Such customers should have the protection of the Commission's price caps rules as a mechanism to keep rates just and reasonable in the absence of competition. Precisely how those mechanisms would work for ILEC competitive necessity contract tariff offerings should be explored in CC Docket No. 96-262.

Although the present Part 61 Rules specifically contemplate the removal of "services" or "portions of services" from existing price caps baskets, they do not provide specific guidance as to how those "portions of services" should be accounted for during the removal process. Specific instructions exist for moving new services *into* price caps baskets.[69] Similar rules would need to be adopted to govern the "removal" of competitive response offerings. Development of such rules also should occur in CC Docket No. 96-262.

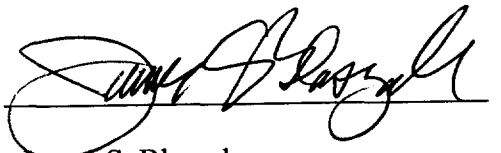
CONCLUSION

For the foregoing reasons, the Commission should deny SBC's Petition for Forbearance and consider in CC Docket No. 96-262 whether to grant dominant ILECs pricing flexibility to respond to competition and, if so, under what circumstances.

[69] See, *e.g.*, 47 C.F.R. §§ 61.42(g), 61.45(f), 61.46(b), 61.47(b), (c).

Respectfully submitted,

AD HOC TELECOMMUNICATIONS
USERS COMMITTEE

By: 

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February 11, 1999

Certificate of Service

I, Anthony J. Mangino, hereby certify that true and correct copies of the preceding Reply Comments of the Ad Hoc Telecommunications Users Committee in CC Docket Number 98-227 were served this 11th day of February, 1999 via hand delivery to the following parties.

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